

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

Criminal No. 3:94CR036-D-

WILLIE FRANK JONES
BILLY RAY GRAY
SYLVESTER BYERS
ANTHONY CLARK MARION

MEMORANDUM OPINION

This matter is before the undersigned on the defendants' multiple pretrial motions. The following motions will be considered in this opinion: 1) the defendants' motion for severance; 2) motion to dismiss unconstitutional penal statute; 3) motion to dismiss the indictment due to duplicity; 4) motion to dismiss indictment due to multiplicity; 5) defendant Anthony Marion's motion to dismiss; 6) defendants' Billy Ray Gray and Sylvester Byers motion to dismiss for violation of the Speedy Trial Clause of the Sixth Amendment and for violation of the Speedy Trial Act (18 U.S.C. § 3161); 7) defendants' Gray and Byers motion to dismiss under Rule 48 of the Federal Rules of Criminal Procedure; and 8) the defendants' motion for grand jury transcripts. The government has responded to the motions. Each motion will be addressed separately below.

MOTION FOR SEVERANCE

The defendants have moved for severance pursuant to Rule 14 of the Criminal Rules of Civil Procedure. The defendants assert that the prejudice is so great that it outweighs the interest of judicial economy and efficiency which may be achieved by a joint trial. The defendants offer several examples of prejudice that

they believe warrants severance. The court finds that the reasons are not compelling.

Rule 14 permits a district court to grant a severance of defendants if "it appears that a defendant or the government is prejudiced by a joinder." To obtain a severance under Rule 14, the movants have the burden of convincing the court that without such drastic relief they will be unable to obtain a fair trial. United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974)(citations omitted). A mere showing of some prejudice has usually been insufficient, for qualitatively it must be the most compelling prejudice against which the trial court will be unable to afford protection. Id.

The defendants assert that a jury will not be able to segregate the evidence applicable to each defendant and follow in limine instructions as they apply to each defendant. Specifically, the defendants claim that "[t]he practical effect of failing to sever the trials of the aforementioned [d]efendants will be a lack of opportunity to present an individual defense and confusion among the jurors as to how to weigh and properly consider the admissibility of evidence as to each [d]efendant." The United States Supreme Court has recognized a preference in the federal system for joint trials of defendants who are indicted together. Zafiro v. United States, 506 U.S. ___, 113 S.Ct. 933, 122 L.Ed.2d 317, 324 (1993). In Zafiro, the Court held that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one

of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Id. at 325. The court is of the opinion that the reasons proffered by the defendants do not warrant severance in the present case, accordingly, the motion will be denied.

MOTION TO DISMISS UNCONSTITUTIONAL PENAL STATUTE

The defendants argue that 18 U.S.C. § 1951 is overbroad and far-reaching. They claim the statute is over broad on its face because it does not require the defendant alleged to have violated the statute to act affirmatively in order to violate the statute. The defendants cite no authority in support of this contention. The court finds that the argument has no merit and thus denies the motion.

Alternatively, the defendants claims the statute is "void for vagueness under the due process clause in that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." Again the defendants cite no authority in support of their claims. The court holds that the argument is meritless and the motion to dismiss the indictment on the aforementioned grounds is denied.

MOTION TO DISMISS THE INDICTMENT DUE TO DUPLICITY

The defendants also claim that the indictment in this case is duplicitous. Duplicity is the charging of more than one offense in a single count. United States v. Baytank (Houston), Inc., 934 F.2d 599, 608 (5th Cir. 1991). The indictment here contains a conspiracy charge with numerous overt acts in furtherance of the conspiracy listed in the first count of the indictment. Many of

the overt acts also constitute the basis for the substantive counts of the Hobbs Act, 18 U.S.C. § 1951, violations contained in the remaining counts. As found by the Third Circuit, an indictment is not duplicitous where acts which could amount to substantive offenses are merely descriptive of the conspiracy. United States v. Addonizio, 451 F.2d 49, 60 (3rd Cir. 1971), cert. denied, 405 U.S. 936. The defendants motion to dismiss for duplicity is denied.

MOTION TO DISMISS FOR MULTIPLICITY

The defendants next claim the indictment is multiplicituous. They assert that "one alleged crime or act has been divided into more than one count." The defendants cite no authority in support of the claim. The indictment contains one count of conspiracy against the defendants for conspiring to violate the Hobbs Act, and 29 substantive counts of Hobbs Act violations wherein each defendant is charged with extortion under color of official right regarding the payoffs each accepted. Multiplicity is the charging of a single offense in more than one count. United States v. Swaim, 757 f.2d 1530, 1536 (5th Cir. 1985)(citations omitted). With respect to the Hobbs Act, each act of extortion is a separate indictable offense, notwithstanding that each act is linked to and is in furtherance of a conspiracy. Addonizio, 451 F.2d at 59, 60. An indictment charging each payoff or payment in a separate count as distinct violations is not multiplicituous. Id. Therefore, the motion to dismiss the indictment for multiplicity is denied.

DEFENDANT MARION'S MOTION TO DISMISS

Defendant Marion filed a motion to dismiss based on the fact that his two previous trials resulted in mistrials and that the new indictment filed on April 22, 1994, adds a conspiracy charge which has never been previously alleged. Marion cites no authority in support of his proposition. The court finding no basis for his argument denies his motion to dismiss.

DEFENDANTS GRAY AND BYERS MOTION TO DISMISS FOR VIOLATION OF THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT AND FOR VIOLATION OF SPEEDY TRIAL ACT (18 U.S.C. § 1361)

The Speedy Trial Act requires the Government to commence the defendant's trial within 70 days of the filing of the indictment or from the date the defendant has appeared before a judicial officer of court in which the charge is pending, whichever date last occurs. 18 U.S.C. § 3161(c)(1). In the instant case, the defendants Gray and Byers were indicted on April 22, 1994 and made their initial appearance and arraignment on May 5, 1994. At the said arraignment, a trial date of June 27, 1994 was set. Defendants filed a series of motions for discovery and bill of particulars on May 11, 1994, and on May 18, 1994, the defense filed a motion for continuance alleging scheduling conflicts and the complexity of the case, and requested that any time be excluded from the Speedy Trial Act. On May 20, 1994, the government filed a motion to determine conflict of interest with respect to all four defendants being represented by the same attorney. On May 23, 1994, the defendants' motion for continuance was granted and a trial date set for August 29, 1994 and all the time from May 23 to August 29 excluded pursuant to the Speedy Trial Act. In the interim, the hearing pursuant to Rule 44(c) concerning the conflict

of interest was held and an appropriate order entered. On June 22, 1994, the motions for discovery and bill of particulars filed by the defense were denied. As noted by the government, only (6) six days have expired of the allowable 70 days between arraignment and trial date. Therefore, there has been no violation of the Speedy Trial Act or any unnecessary delay in bringing this case to trial.

The court now turns to the defendants arguments as they pertain to the original indictments. Gray and Byers were originally indicted on or about June 9, 1993. United States District Court Judge Neal Biggers, the trial judge then assigned to the cases, issued an order on September 23, 1993, excluding all computation relative to the Speedy Trial Act from September 23, 1993, until trial in those cases could be set. Prior to the setting of those cases for trial, the present indictment was returned and the original indictments against Gray and Byers were dismissed without prejudice. The present indictment added defendants and a conspiracy count to the substantive counts included in the instant case. The original indictments have been dismissed without prejudice, and these defendants have not produced any evidence of prejudice that would warrant any further relief. Defendants' Gray and Byers motion to dismiss for violation of the Speedy Trial Clause of the Sixth Amendment and for violation of the Speedy Trial Act is denied.

DEFENDANTS' GRAY AND BYERS MOTION TO DISMISS UNDER RULE 48

Defendants Gray and Byers also move to dismiss the indictment under Rule 48(b) of the Federal Rules of Criminal Procedure which provides:

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

The defendants argue that, due to the unnecessary delay in bringing them to trial, the court should dismiss the indictment with prejudice. Rule 48(b) vests much discretion in the trial court and a dismissal on speedy trial grounds is not mandatory unless the defendant's constitutional speedy trial rights have been violated. United States v. Edwards, 577 F.2d 883, 887 n. 1 (5th Cir. 1978), cert. denied, 439 U.S. 968. Here, as set forth above, the court has found that there has been no unnecessary delay with respect to this indictment or the original indictment. All parties involved have acknowledged the complexity of the case at hand. In a similarly complicated case, the Eight Circuit has held that an 18-month delay between indictment and trial was insufficient to constitute unnecessary delay to warrant dismissal under Rule 48(c). United States v. DeLuna, 763 F.2d 897, 923 (8th Cir. 1985), cert. denied, 474 U.S. 980. The elapsed time between the original indictments and the present indictment was eleven (11) months, not counting exclusions. The court finds that there is no purposeful delay by the government and no justifiable reason for dismissal under Rule 48(b).

MOTION FOR GRAND JURY TESTIMONY

The defendants have moved for Grand Jury transcripts relating to the original indictments, superseding indictments, and the new

indictment which is the above captioned case. The following transcripts are requested:

1. United States v. Anthony Marion, Criminal No. 3:93CR087-D, filed June 9, 1993;
2. United States v. Anthony Marion, Criminal No. 3:93CR087-D, filed February 24, 1994;
3. United States v. Willie Frank Jones, Billy Ray Gray, Sylvester Byers and Anthony Clark Marion, Criminal No. 3:93CR036-D, filed April 22, 1994;
4. United States v. Billy Gray, Criminal No. 3:93CR083-D, filed June 9, 1993;
5. United States v. Willie Frank Jones, Criminal No. 3:93CR084-D, filed June 9, 1993;
6. United States v. Sylvester Byers, Criminal No. 3:93CR081, Filed June 9, 1993;
7. United States v. Sylvester Byers, Criminal No. 3:93CR081, filed on or about February 24, 1994;
8. United States v. Willie Frank Jones, Criminal No. 3:93CR084, filed on or about February 24, 1994;
9. United States v. Billy Ray Gray, Criminal No. 3:93CR083-B, filed on or about February 24, 1994.

The defendants claim that production of the grand jury transcripts are warranted so that the defendants herein can determine whether or not sufficient grounds exist for a Motion to Dismiss.

Parties seeking grand jury transcripts under Rule 6(e)[(3)(c)(ii)] must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that there request is structured to cover only material so needed.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979)(footnote omitted). The burden is on the defendant to demonstrate (1) a "particularized need," and (2) that the

particularized need outweighs the policy of protecting the secrecy of grand jury proceedings. Id. at 223. The court is of the opinion that the defendants have not shown a particularized need for the testimony requested. Accordingly, the defendants' motion for the transcripts of the grand jury testimony is denied.

CONCLUSION

For the foregoing reasons and authorities, the pre-trial motions of the defendants are not well taken and denied.

An order in accordance with this memorandum opinion shall issue this day.

THIS ____ day of September, 1994.

United States District Judge